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Supreme Court, U.S.
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No. 01-769

IN THE

Supreme Court of the United States

EDWARD R. DONNELLY, Superintendent of Wende Correctional Facility,

Petitioner,

—against—

JEHAN ABDUR RAHEEM, formerly known as John Whitaker,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

In opposing the petition for certiorari, the defendant mischaracterizes the findings of the state courts, the issues presented to and decided by the court below, and the issues presented in the petition for certiorari. The defendant ignores the state court finding that the identifications were independently reliable; ignores the State's arguments in the federal courts in defense of that state court finding; discounts the Second Circuit's decision overturning that finding; mischaracterizes the extent of the Second Circuit's reliance on trial testimony as a basis for overturning that finding; and ignores the issue, presented in the certiorari petition, of whether the Second Circuit applied an erroneous constitutional standard by relying on trial testimony to overturn the state court finding of independent reliability.

In addition, the defendant asserts that there is no conflict among the federal courts of appeals on the issue presented by the petition, but that assertion rests on a fundamental misinterpretation of the scope of the Second Circuit's decision in this case.

1. In describing the state court findings underlying the denial of the motion to suppress the identifications, the defendant refers only to the finding that the lineup was not suggestive, but completely ignores the alternative finding that the identifications were independently reliable (Brief in Opposition ["Br. Opp."] at 4 ¶ 1; at 5 ¶ 3). In fact, the state court decisions that the identifications were admissible rested on both of those alternative

grounds. First, both the trial court and the Appellate Division explicitly concluded that the lineup was not impermissibly suggestive (*see* Appendix ["App."] at 11a [quoting trial court's decision]; App. at 112a). Second, at the conclusion of the suppression hearing, at which both identifying witnesses testified about their opportunity to observe at the time of the shooting, the trial court found that the identifications were independently reliable, concluding that "each of the witnesses had ample time to view and notice the defendant's [sic] time of the occurrence" (Hearing tr. at 261); and on appeal, the Appellate Division explicitly found that the in-court identification had a "sufficient independent origin" (App. at 112a).

The defendant ignores that state court finding of independent reliability. But the issues presented in the certiorari petition concern the propriety of the legal standards employed by the Second Circuit in overturning that finding.

2. Without any basis at all, the defendant asserts that the district court's proposed corroboration rule, which would consider additional evidence of a defendant's guilt in assessing the reliability of an identification, was "the key issue litigated by the parties and decided by the Second Circuit" (Br. Opp. at 6-7). That assertion is incorrect. Rather, the State's brief to the Second Circuit was devoted primarily to the arguments that the lineup was not suggestive and that, in light of the factors enumerated in *Neil v. Biggers*, 409 U.S. 188 (1972), and *Manson v. Brathwaite*, 432 U.S. 98 (1977), the identifications were independently reliable. Indeed, the discussion of those contentions occupied eighteen of the twenty-one pages in the argument section of the State's brief to the Second Circuit, while less than three pages at the end of the argument section addressed the district

court's corroboration rule. Similarly, the Second Circuit devoted a greater portion of its opinion to a discussion of whether the lineup was suggestive and whether the identifications were reliable in light of *Biggers* (App. at 21a-33a) than to a discussion of the district court's corroboration rule (App. at 34a-38a).

Thus, it is inaccurate to characterize the corroboration rule as "the key issue" in the Second Circuit. The issue regarding the state court finding of independent reliability received at least as much attention in the Second Circuit as the corroboration rule did, and it is the standard of review of the independent reliability finding that presents the issues on which the State is seeking certiorari.

3. The defendant blatantly mischaracterizes the issues presented in the petition for certiorari. The defendant asserts that the State challenges "only" the Second Circuit's rejection of the district court's holding regarding the inadvertence of any suggestiveness in the lineup, and that the Second Circuit's ruling on that issue is "the sole ground" challenged by the State in this Court (Br. Opp. at 7, 15). The defendant similarly limits one of the questions presented to the issue of inadvertent suggestiveness in the lineup (Br. Opp. at i [question 2]).

In fact, the petition for certiorari challenges the propriety of the legal standards employed by the Second Circuit in rejecting the state court finding that the identifications were independently reliable. The State argues in the petition that, by relying on trial testimony to attack the suppression ruling and by ignoring the deferential standard of habeas corpus review required by statute, the Second Circuit resolved the issue of independent reliability incorrectly (Pet. at 21-25).

4. The defendant attempts to minimize the extent to which the Second Circuit relied on trial testimony as a basis for overturning the finding of independent reliability, but the defendant does so by mischaracterizing the Second Circuit's decision in two ways.

First, the defendant asserts that, in the Second Circuit's evaluation of whether the identifications were independently reliable, "for the most part, the court's references to trial testimony are interspersed among a far greater number of references to the *Wade* hearing testimony" (Br. Opp. at 9 n.4). The defendant's assertion is demonstrably false. In the portion of the Second Circuit's opinion analyzing the issue of independent reliability of the identifications (App. at 29a-33a), the Second Circuit explicitly cited to testimony at the *Wade* hearing eleven times, but explicitly cited to testimony at the trials ten times. Moreover, in seven of those ten instances when the Second Circuit cited to trial testimony, the Second Circuit referred exclusively to trial testimony and did not refer to *Wade* hearing testimony to support the proposition for which the trial testimony was cited.

Second, the defendant entirely fails to address the Second Circuit's substantial reliance on the evidence that the witnesses made a photographic misidentification of the second gunman (*see* Pet. at 18, 24). That evidence was elicited only at the trials and not at the *Wade* hearing. But the Second Circuit's opinion referred to that evidence four separate times (App. at 5a, 30a-31a, 33a [twice]), three of which were during the court's analysis of independent reliability.

Thus, the Second Circuit's decision on the issue of independent reliability rests at least as much on trial testimony as it does on *Wade* hearing testimony. It is, of course, impossible to demonstrate with certainty that the

Second Circuit's resolution of the issue would have been different absent the reliance on trial testimony. But the Second Circuit's repeated references to trial testimony in its analysis of independent reliability presumably means that the court considered the trial testimony significant to its determination of that issue.

5. Contrary to the defendant's contention (Br. Opp. at 12-13), the issue of whether a defendant may rely on trial testimony as a basis to attack a pretrial suppression ruling was raised and resolved in the Second Circuit, and is therefore reviewable in this Court. In the State's brief to the Second Circuit, the State explicitly argued that "a defendant may not rely on trial testimony to challenge the correctness of the pretrial suppression ruling" (State's brief to Second Circuit at 35 n.4) (citing cases). In a reply brief, the defendant disputed that proposition, asserting that federal courts of appeals have ruled that "evidence adduced at trial may be considered in reviewing—not just affirming—a pre-trial suppression decision" (Defendant's reply brief to Second Circuit at 17 n.7) (citing cases). That issue was obviously decided by the Second Circuit, because that court repeatedly and explicitly cited trial testimony as a basis for its decision to overturn the suppression ruling.

The fact that the Second Circuit did not otherwise say that it was relying on trial testimony or explain its rationale for doing so does not preclude review of this issue by this Court. Nor, as the defendant suggests, is review precluded merely because the State advanced its contention on this issue in a footnote of the argument section of its brief rather than in the text. That footnote obviously put the defendant on notice of the argument, because the defendant responded to it in his reply brief. The State's argument, together with the defendant's response to that argument, fairly presented the issue to

the Second Circuit. Thus, the issue is reviewable by this Court.[1] *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469-70 (2000) (issue was reviewable by Supreme Court so long as court of appeals was "fairly put on notice" as to substance of issue).

6. The defendant contends that there is no conflict among the federal courts of appeals on the issue of whether, on federal habeas review, a state prisoner may rely on trial testimony to challenge a pretrial suppression ruling (Br. Opp. at 13-15). The defendant's contention is incorrect, and rests on two critical flaws in his reasoning.

First, the defendant notes that, in this case, the Second Circuit's reliance on trial testimony to overturn a pretrial suppression ruling arises in a federal habeas proceeding, whereas the court of appeals cases cited in the petition for certiorari, which hold that a defendant may not rely on trial testimony to attack a pretrial suppression ruling, arose on direct appeal. But the different procedural posture of the cases is inconsequential, and does not in any way detract from the circuit court conflict on this issue.

On federal habeas review, a state prisoner is entitled to relief only for a violation of federal law. Therefore, when, as in this case, a federal court grants a writ of habeas corpus by relying on trial testimony to overturn a state court's pretrial suppression ruling, the federal habeas court is necessarily holding that the state prisoner's ability to rely on trial testimony to attack the pre-

[1] Moreover, contrary to the defendant's contention (Br. Opp. at 12), the State was permitted, in the Second Circuit, to challenge the district court's reliance on trial testimony, even though the State had not done so in the district court. The district court denied the habeas petition, and thus the State, as the respondent in the Second Circuit, was "entitled to rely on any legal argument in support of the judgment below." *See Schiro v. Farley*, 510 U.S. 222, 228-29 (1994) (citation omitted).

trial suppression ruling is a matter of constitutional entitlement. But when, as in the six court of appeals cases cited in the petition for certiorari (Pet. at 12), a federal court, on direct appeal, refuses to allow a defendant to rely on trial testimony to attack a pretrial suppression ruling, the federal court is necessarily holding that the defendant has no such constitutional entitlement. Thus, regardless of the difference in the proceeding in which the issue arises, the Second Circuit's decision in this case irreconcilably conflicts with six federal circuit courts on the issue of whether a criminal defendant is constitutionally entitled to rely on trial testimony to attack a pretrial suppression ruling.

The second flaw in the defendant's contention that there is no conflict on this issue arises from his failure to identify the distinction between reliance on trial testimony to *attack* a pretrial suppression ruling and reliance on trial testimony to *support* a pretrial suppression ruling. The defendant cites several decisions—including this Court's decision in *Biggers*—in which federal courts have relied on trial testimony to support a suppression ruling (Br. Opp. at 14-15), and the defendant apparently suggests that those decisions provide authority for the Second Circuit's decision in this case. But the holding of those decisions—that a reviewing court may rely on trial testimony to support a pretrial suppression ruling—is entirely different from the Second Circuit's holding in this case that a reviewing court may rely on trial testimony to overturn a pretrial suppression ruling. Indeed, at least three federal courts of appeals have expressly held that trial testimony may be relied upon to uphold a pretrial suppression ruling, but not to overturn it. *United States v. Parra*, 2 F.3d 1058, 1065 (10th Cir.), *cert. denied*, 510 U.S. 1026 (1993); *United States v. Hicks*, 978 F.2d 722, 724-25 (D.C. Cir. 1992); *United States v. Longmire*, 761 F.2d 411, 418, 420-21 & n.6 (7th Cir.

1985). Thus, the decisions cited by the defendant provide no support for the Second Circuit's reliance on trial testimony to overturn a pretrial suppression ruling on habeas review.

CONCLUSION

On an important constitutional issue, the decision below is in conflict with other federal courts of appeals and with state courts of last resort. This Court should grant certiorari to resolve that conflict.

Respectfully submitted,

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